Office - Supreme Court, U.
FILED
APR 29 1952
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 743

EVAN A. SHOLL AND NATIONAL CASUALTY COMPANY,

Petitioners,

vs.

EDNA V. CADWALLADER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

GEORGE A. CHADWICK, JR.,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Reason for Granting the Writ	4

Table of Cases Cited

Assum v. *McManigal, et al.*, 98 F. Supp. 31 (Dist. Ct. Ohio 1951)	6
Bajerczak v. *B. H. Sobelman & Co.*, 89 F. Supp. 78 (Dist. Ct. Penn. 1949)	6
Cardillo v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S. Ct. 801 (1947)	8
Dawson v. *Jahncke*, 33 F. Supp. 668 (Dist Ct. La. 1940)	5
DiGiorgio Fruit Corporation v. *Norton*, 93 F.(2d) 119, (C.C.A. 3, 1937)	7
Great American Indemnity Co. v. *Britton*, 86 U.S. App. D.C. 44, 179 F.(2d) 60 (C.C.A. D.C. 1949)	7, 8
Hitty v. *Fairbanks Exploration*, 82 F.(2d) 77 (C.C.A. 9, 1936)	7
Kobilkin v. *Pillsbury, et al.*, 103 F.(2d) 667 (C.C.A. 9, 1939) Affd. 309 U.S. 619, 60 S. Ct. 465, 84 L. Ed. 983	2, 5
Kropp v. *Parker*, 8 F. Supp. 290 (Dist. Ct. Md. 1934)	8
Liberty Mutual Insurance Corporation v. *Parker*, 19 F. Supp. 686 (Dist. Ct. Md. 1937)	8
Ocean Accident and Guaranty Corporation v. *Lawson*, 135 F.(2d) 865 (C.C. A. 5, 1943)	6
O'Leary v. *Brown-Pacific-Maxon*, 340 U.S. 504, 71 S. Ct. 470 (1951)	6

Page

Pillsbury v. *United Engineering Co.*, — U.S. —, — S. Ct. — (January, 1952) 2

Potomac Electric Power Co. v. *Cardillo*, 71 App. D.C. 163, 107 F.(2d) 962 (C.C.A. D.C. 1939) 8

Rowen v. *Brown*, 61 F. Supp. 8.58 (Dist. Ct. Mich. 1945) 8

Urie v. *Thompson*, 337 U.S. 163, 69 S. Ct. 1018 (1949) 8

Wetzel v. *Britton*, 83 U. S. App. D.C. 327, 170 F.(2d) 285 (C.C.A. D.C. 1948) 8

Young v. *Hoage*, 67 App. D.C. 150, 90 F.(2d) 395 (C.C.A. D.C. 1937) 5

STATUTES CITED

Longshoremen's & Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. 901 et seq.) 2, 3

District of Columbia Workmen's Compensation Act (Title 35, Section 501, District of Columbia Code, 1940) 2, 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

No. 743

EVAN A. SHOLL AND NATIONAL CASUALTY COMPANY,

Petitioners,

vs.

EDNA V. CADWALLADER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the District of Columbia reversing the order of the United States District Court for the District of Columbia which in turn sustained the order of the Department of Labor rejecting compensation benefits to the respondent.

Opinions Below

The opinion of the United States Circuit Court of Appeals for the District of Columbia has not been published in a reporter at this date. The opinion of the United States District Court for the District of Columbia is not reported.

Jurisdiction

The opinion of the United States Circuit Court of Appeals for the District of Columbia was entered on January 31, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254. The decision of the lower court is in conflict with the case of *Kobilkin* v. *Pillsbury, et al.,* 103 F. (2d) 667 (C. C. A. 9, 1939) Affd. 309 U. S. 619, 60 S. Ct. 465, 84 L. Ed. 984, and is against the trend laid down in *Pillsbury, et al.,* v. *United Engineering Co., et al.,* — U. S. —, — S. Ct. — (January 1952).

Question Presented

Whether the recurrence of previously incurred disability or disease may be treated as a new injury in order that the statute of limitations may commence to run anew; whether the reviewing court should reverse the findings of the Deputy Commissioner where such findings are grounded in the evidence and are not forbidden by law.

Statutes Involved

The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. 901, et seq.).

District of Columbia Workmen's Compensation Act (Title 35, Section 501, District of Columbia Code, 1940).

Statement

On July 29, 1944, and for approximately one year prior thereto, respondent had been employed by petitioner, Evan A. Sholl, a restaurant operator in the City of Washington, D. C. Petitioner Sholl had procured a policy of workmen's compensation insurance according to the terms of which petitioner, National Casualty Company, agreed to pay workmen's compensation benefits chargeable to petitioner Sholl.

The employment of the respondent was as a baker, and in the performance of the duties of a baker the respondent came into contact with wheat flour, as a result of which she suffered dermatitis. On July 29, 1944, the respondent became totally disabled as a result of said dermatitis and required medical care and treatment. Petitioners made voluntary payments of compensation to the respondent from July 29, 1944, until October 25, 1946, the period of total disability.

On October 25, 1946, the respondent was "free of the symptoms of dermatitis and was able to work". Thereafter, in December, 1946, the respondent suffered a recurrence of dermatitis and as a result became totally disabled on January 16, 1947. Respondent negotiated with petitioners subsequent to January 16, 1947, for payment of compensation but petitioners denied liability for additional compensation at all times.

On November 10, 1947, more than one year after the last voluntary payment of compensation, the respondent filed a claim for additional compensation under the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. 901, et seq.), applicable as the Workmen's Compensation Act of the District of Columbia (Title 36-501, D. C. Code (1940)). The petitioners controverted the claim as not being timely filed. The Deputy Commissioner held that the claim was barred by the one year statute of limitations contained in Section 13(a) of the Act. By way of appeal, respondent filed a complaint in the United States District Court for the District of Columbia. The District Court dismissed the complaint of the respondent and sustained the findings of the Deputy Commissioner. Respondent thereupon appealed to the United States Circuit Court of Appeals for the District of Columbia, which Court sustained the District Court in a

Per Curiam decision dated July 12, 1951 (R. 19). Upon rehearing, the Court, in a two to one decision, reversed the decision of the District Court (R. 11).

Reason for Granting Writ

Congress has performed an excellent job in the field of workmen's compensation. Many of the more progressive state legislatures were first to recognize the need of industry and labor for a stable program of workmen's compensation, but Congress was soon to join the trend toward broader and more comprehensive benefits. It is pleasing to note that Congress, in passing the Longshoremen's and Harbor Workers' Compensation Act, *supra,* has presented the employers and employees with one of the best programs thus far devised in the field of workmen's compensation.

The path toward progressive legislation in this field has not been smooth nor has it been without injustices in the developmental stage. These injustices have resulted in corrective legislation. Congress has done a remarkable job in trying to state the law in such a clear and precise manner that all persons concerned with the Act will know their rights and obligations. Congress has also made plain its intent that the Act should operate with a minimum of formal regulations and administration consistent with the principles of orderly procedure and the protection of rights of all parties concerned therewith.

The judiciary must be commended for its fine work of construing and interpreting the Longshoremen's Act in such a clear and precise manner as to make it a practical law. However, a segment of the judiciary in construing the Act has taken upon themselves the burden of achieving an illusory purpose of the Act, although in doing so they must distort the manifest intent of Congress. The effect of such judicial legislation has been to create confusion as to juris-

diction, to hedge and qualify what should be clear and definite, and to deny numerous persons, including employer and employee, the rights Congress intended them to have under the Act.

The courts have been consistent in their belief that the Act should be liberally construed. Their fallacy lies in their inability to determine how liberal they shall be in such construction before they have invaded the exclusive field of the legislature. *Kobilkin* v. *Pillsbury, supra; Potomac Electric Power Co.* v. *Cardillo,* 107 F. (2d) 962, 71 App. D. C. 163 (C.C.A. D.C. 1939). The natural result of such interpretation is confusion in a field of law which should otherwise be clear and precise.

There could scarcely be a clearer statement of the intent of Congress than is contained in Section 13(a) of the Longshoremen's Act, which provides as follows:

> "The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment."

The section is mandatory by its own terms. The fact that it contains an exception does not detract from the necessity of strict compliance with the section as a whole. This section is jurisdictional in that a claim is barred unless the statute is complied with. *Dawson* v. *Jahncke Dry Docks,* 33 F. Supp. 668 (U.S.D.C. La. 1940); *Young* v. *Hoage,* 90 F. (2d) 395, 67 App. D.C. 150 (C.C.A. D.C. 1937). While a great many courts recognize the mandatory features of this section there has been a small but potent group of court decisions which completely ignores the wording of the statute

or construes the words in such a manner as to cast doubt and confusion on the rights of everyone related to the Act.

The instant case serves to illustrate the manner by which the courts substitute their own opinion for the clearly stated intent of Congress. A circuit court of appeals, without stating any case or statute in support of, and with complete disregard of authorities to the contrary, held that each recurrence of *disability* from "injury" constitutes in itself a separate "injury" for the purposes of the time limitation in Section 13(a) for the filing of claims. In so ruling, the court reversed its own earlier ruling in the same case and the ruling of the District Court which had sustained the Deputy Commissioner's rejection of the claim as being barred by the statute of limitations. This represents a complete departure from the authorities in the field of workmen's compensation. *O'Leary* v. *Brown-Pacific-Maxon,* 340 U. S. 504, 71 S. Ct. 470 (1951); *Ocean Accident and Guaranty Corp.* v. *Lawson,* 135 F. (2d) 865 (C.C.A. 5, 1943).

It is submitted that the state of the law on the statute of limitations in Section 13(a) by reason of the decision in the present case is now beyond comprehension by the employee, employer, or administrator of the Act. The court of appeals in the instant case is in direct conflict with other circuit courts on this subject and with this Court. It has been held that where voluntary payments have been made for an immediate disability, a claim for recurrent periods of disability filed after the expiration of one year from the date of the last payment is barred by the statute of limitations in Section 13(a) of the Longshoremen's Act. *Bajerczak* v. *B. H. Sobelman & Co.,* 89 F. Supp. 78 (U.S.D.C. Penn. 1949); *Kobilkin* v. *Pillsbury, et al., supra; Assum* v. *McManigal, et al.,* 98 F. Supp. 31, U.S.D.C. E.D. Ohio (1951). The language of the Court in the latter case demonstrated that ag-

gravations and recurrent injuries are not to be treated as new injuries:

> "It seems clear that a subsequent recurrence or aggravation of an earlier compensated injury does not constitute a new injury under the Act.
>
> "It should be observed that the Act provides for the contingency of future aggravations or recurrences. Thus, in Section 22, provision is made for the modification of awards where there is a change in conditions. Once again, however, there is a one year limitation, running from the time of the last payment of compensation.
>
> "The Court is mindful of the repeated assertion that the 'remedial and beneficent purpose' of the Act must be effectuated. It cannot grant relief, however, where to do so would necessitate that it engage in legislation."

Many of the courts join with the court in the *Assum* case in refusal to engage in judicial legislation. Unfortunately, however, a number of the other courts are not so conscious of their duty not to legislate. A classic example of the contradictory decisions is found on the question of *when* an injury occurs and when the statute of limitations in Section 13(a) begins to run. It has been held by those courts applying sound rules of statutory construction that where the occurrence of accident and injury are contemporaneous in time, the statute of limitations commences to run at time of injury. *Pillsbury* v. *United Engineering Co., supra; Kobilkin* v. *Pillsbury, et al., supra; Todd Seattle Dry Docks* v. *O'Leary,* 87 F. Supp. 907 (U.S.D.C. Washington 1949); *Hitty* v. *Fairbanks Exploration,* 82 F. (2d) 77 (C.C.A. 9, 1936). It has been held by other courts that "injury" under the Act means "compensable" injury and that the statute of limitations does not begin to run until disability occurs in the sense of loss of pay. *DiGiorgio Fruit Corporation* v. *Norton,* 93 F. (2d) 119 (C.C.A. 3, 1937); *Great American*

Indemnity Co. v. *Britton*, 179 F. (2d) 60, 86 U. S. App. D. C. 44 (C.C.A. D.C. 1949); *Potomac Electric Power Co.* v. *Cardillo, supra; Kropp* v. *Parker*, 8 F. Supp. 290 (U.S.D.C. Maryland 1934). Other cases have held that the time the statute of limitations begins to run is determined by whether or not the injury or disease in question is latent or patent. *Liberty Mutual Insurance Corp.* v. *Parker*, 19 F. Supp. 686 (U.S.D.C. Maryland 1937); *Urie* v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018 (1949).

It should be pointed out that the rights of the employee and employer affected by Section 13(a) will remain in a state of doubt and confusion because of the novel doctrine in the present case, and the Administrator of the Act will equally be in a state of doubt. In the case of *Great American Indemnity Co.* v. *Britton, supra*, the court stated that the Deputy Commissioner's finding that the claim was timely filed is entitled to great weight. His findings regarding circumstances, nature, extent, and consequences of injuries are conclusive when supported by evidence. *Rowen* v. *Brown*, 61 F. Supp. 858 (U.S.D.C. Michigan 1945). The reviewing court is limited to determining whether the Deputy Commissioner's conclusion in a compensation case is forbidden by law or without any reasonable basis. *Wetzel* v. *Britton*, 170 F. (2d) 285, 83 U. S. App. D. C. 327 (C.C.A. D.C. 1948). His conclusions will be sustained even if his inferences are considered more legal than factual if they have substantial roots in the evidence and are not forbidden by law. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 67 S. Ct. 801 (1947), as modified by *O'Leary* v. *Brown-Pacific-Maxon, supra*. The circuit court of appeals in the instant case has gone completely against the tide, including the exposition of the law on this subject by this Court, and has developed an unjust and unworkable concept of Section 13(a) of the Act. The circuit court calls a *recurrence* of injury a separate injury, ignoring the antecedents of the recurrence. The

Administrator of the Act in the District of Columbia will be obliged to regard each recurrence of injury as a new "injury" case, while other Deputy Commissioners under the Longshoremen's Act elsewhere in the country will be obliged to follow their own circuit courts holding to the contrary.

Whether or not a recurrence of previously incurred disability can be treated as a new "injury" and thus commence the statute of limitations running anew poses a novel question. Heretofore the statutory "injury" has always been the harm resulting from the accident or the disease arising from the employment. The lower court has overlooked the fact that no *new* causal agent is involved in mere recurrence of disability. Recurrences, as such, are always due to the antecedent injury cause. The court now makes a *result* a *cause*. The consequences of leaving the law in its present state of confusion will indeed be grave. Circuit Judge Prettyman, dissenting in the instant case, was diligent in setting forth some of the difficulties to be incurred by the employee alone, without appraising the damage and insecurity to be suffered by the employer. Under the present interpretation a new claim for injury would have to be filed after each recurrence which heretofore was not the law. The difficulties encountered by an employee with an intermittent disability will surely be great. He will have to file repeated claims. Such an employee, however, should expect that he will be protected from the time he has filed the only claim required by the Act. The employee will now be required to wait the seven day waiting period as provided by Section 6 *after each recurrence* before he is entitled to further payments of compensation. The law as construed by the lower court will require a series of echeloned and unrelated compensation awards, which in itself will be confusing.

Compensation, according to the statute, is predicated upon the weekly pay at time of injury. If recurrences mark new injuries then the wages at time of recurrence rather

than injury would control. Hence, employees suffering like injuries in the same accident may receive different compensation depending upon the fortuitous circumstance of recurrence. This may be illustrated as follows:

Employee A earning $100. per week is injured January 1, 1952, in the same accident as employee B. Both receive compensation based upon $100. per week. Employee A continues to be disabled without break and receives compensation based upon his $100. weekly pay at time of injury. Employee B, however, is disabled intermittently. He has a recurrence of disability within one year after last payment of compensation but at a time when his wage may be but $75. per week. Because of this fortuitous circumstance of recurrent disability (each recurrence being a new or separate injury) he must suffer a loss of compensation because of his new pay rate. Moreover, employers will suffer unnecessarily since each so-called new injury will open the way to a new and separate maximum liability for compensation under Section 14(m) of the Act. Presumably, employers would have to report each recurrence under Section 30 of the Act as a new injury. Employees would be put to repeated notices of injury under Section 12, which most of them might be expected to overlook to their peril because of the absurdity of such a requirement—but one which the lower court's logic nevertheless will require. These are only a few of the completely confusing results which flow from such an absurd concept that each recurrence is itself a new injury.

This decision will unquestionably nullify the one year limitation upon claims after cessation of voluntary payments. Such cessation usually occurs when the employee resumes working. The only need for a later claim would be if and when he becomes sick again. The statute says his claim must be filed within one year after the last voluntary

payment. The courts in some judicial circuits hold that he has one year after his incapacity recurs; other courts say that he must conform to the statute and has only one year after the last voluntary payment to file his claim.

We may safely say that the lower court's decision prevents any repose of a case. If an employee should have recurrence of disability 50 years after the date of last payment of compensation he may now file claim as though he had a new injury. This construction of the Act discriminates against those employees who are disabled less than 7 days but have recurrences more than a year thereafter. Presumably, not having received compensation initially, their recurrences are (inconsistently) not new injuries. If the opposite view should be applied, then disability arising at any time beyond one year after injury would have to be treated in the same manner as a recurrence and the statute of limitations ceases to have any meaning whatsoever. Surely, this Court will not permit such erosion of a clearly stated statute.

To say that the rights of all persons concerned with the Act are easily ascertainable would surely be an understatement. We entertain no doubt but that the decision of the Court below is erroneous and has contributed monumentally to the confusion of the law on this subject. It is respectfully urged that the time for correction is now, before a confused mass of legal precedent accumulates and in time to prevent the welter of uncertainty and confusion which is the inevitable product of the lower court's decision.

Respectfully submitted,

GEORGE A. CHADWICK, JR.,
Counsel for Petitioners.

Office - Supreme Court, U. S.
FILED
MAY 1 0 1952
CHARLES ELMORE CROPLEY
CLERK

No. 53

MADE IN U.S.A.

THIS PAGE BOUND VERTICAL IN BOOK

THIS PAGE BOUND VERTICAL IN BOOK

THIS PAGE BOUND VERTICAL IN BOOK

THIS PAGE BOUND VERTICAL IN BOOK

THIS PAGE BOUND VERTICAL IN BOOK

condition. This is in truth a latent injury or an occupational disease.

II.

THERE IS NO CONFLICT

There is no conflict between the decision of the court below and the decisions in Pillsbury vs. United Engineering Company, supra, and Robillio vs. Pillsbury, supra.

III.

NO IMPORTANT FEDERAL QUESTION IS INVOLVED

This case involves a simple question of the construction to be given to a Workmen's Compensation Act. The Deputy Commissioner charged with the responsibility of administering this statute has not petitioned for certiorari. He, apparently, does not share the view of the petitioners, the employer and the insurance carrier, that irremediable confusion will result from the application of the rule enunciated by the court below. In any event, the fact that a legal proposition requires some concentrated thought in the application is not evidence that the rule is a bad one. On the other hand, a rule which bars a claim before there is any evidence of the existence in harsh and even absurd. Congress intended no such result in enacting a statute whose purpose is to compensate workmen for injuries sustained while engaged in their employment regardless of fault.

The factual situation which has arisen in this case is an extremely unusual one. Until such time as a conflict arises, there is no reason why this Court should pass upon the question presented by this case. In those few cases which may arise and which are similar, the precise and simple rule of the court below can easily be applied by the Deputy Commissioner and by the District Courts throughout the nation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

THIS PAGE BOUND VERTICAL IN BOOK

THIS PAGE BOUND VERTICAL IN BOOK